FILE COPY

AUG 6 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

TONY RICE, GEORGE W. ZARAK, ARLENE ZARAK, WILLIAM ZARAK, JR., and DARLENE ZARAK,
Petitioners,

vs.

UNITED STATES OF AMERICA; ROGERS C. B. MORTON, As Secretary of the Interior; BURTON W. WILCOCK, Director of Bureau of Land Management; EDWIN ZAIDLICZ, State Director, Bureau of Land Management; EUGENE NEWELL, Chief, Division of Technical Services, Bureau of Land Management; and BURLINGTON NORTHERN, INC.,
Respondents.

BRIEF OF BURLINGTON NORTHERN, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. FARRELL
Burlington Northern, Inc.
176 East Fifth Street
St. Paul, Minnesota 55101
612-227-0911

E. T. COMMY, JR.
600 First National Bank Building
Fargo, North Dakota 58102

Attorneys for Respondent Burlington Northern, Inc.

R. L. Mathenhall, Inc., 928 Cherry Street, Kansas City, Mo. 64106, 471-3939

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

TONY RICE, GEORGE W. ZARAK, ARLENE ZARAK, WILLIAM ZARAK, JR., and DARLENE ZARAK,

Petitioners,

vs.

UNITED STATES OF AMERICA; ROGERS C. B. MORTON, As Secretary of the Interior; BURTON W. WILCOCK, Director of Bureau of Land Management; EDWIN ZAIDLICZ, State Director, Bureau of Land Management; EUGENE NEWELL, Chief, Division of Technical Services, Bureau of Land Management; and BURLINGTON NORTHERN, INC.,

Respondents.

BRIEF OF BURLINGTON NORTHERN, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner says that the decision of this Court in *United States* v. *Union Pacific Railway Company*, 77 S. Ct. 685, 353 U.S. 112, was ignored by the Circuit Court of Appeals and that its decision is "in conflict with the existing and prevailing law of this court" as set forth in the *Union Pacific* case. (See pages 9, 10, 11, 12 & 13 of Petition). The petition, however, fails to point out with any clarity, where the *Union Pacific* case is in conflict with

the *Northern Pacific Railway* v. *Townsend,* 190 U.S. 267, and why the *Townsend* case is not still the existing law of this Court.

It should be noted that the trial court, U. S. Judge Van Sickle, quoting from *Hastings & D. R. Co.* v. *Whitney,* 132 U.S. 357 (1889), which cites *Wilcox* v. *Jackson,* 38 U.S. 425 (1839), held that the right of way granted to the Northern Pacific Railroad Company was severed from the mass of public lands, and, therefore, a conveyance by patent of a section of land through which the granted right of way extended without a reservation of the right of way by the United States did not operate to convey the minerals in the right of way to the patentee.

Petitioner contends that the *Union Pacific* case reversed previous holdings that the railroad owned all minerals under the right of way and that this reversed the *Townsend* case as it was not applicable to a mineral case. (Page 10 (2) and pages 12 and 13 of Plaintiff's Petition).

The specific holding in the *Townsend* case was that when right of way is granted the land forming the right of way is taken out of the category of public land subject to preemption and sale and homesteaders thereafter can acquire no interest in land within the right of way on the ground that the grants were of a full legal subdivision which included part of the right of way.

In the *Union Pacific* case, this Court clearly held that the Railroad acquired no mineral rights in the granted right of way, other than the rights to the coal and iron therein, and said that to hold otherwise would be contrary to the rule which states that land grants are to be construed favorably to the Government and nothing passes except what is conveyed in clear language and any doubts are resolved for the Government and not against it.

For the most part, the Petition for Certiorari is a repetition of what petitioners have said before. There appears to be one exception, however, that being that petitioners now have emphasized the words "in a body" as they appear in the Homestead Act of May 20, 1862 (12 Stat. 392). They contend that since the petitioners' predecessors in title to the lands granted to such predecessors under the Homestead Act must be pursuant to said Act, granted in one piece or "in a body", the homestead patentees acquired full title to the lands patented to them, including the minerals therein, even though bisected or traversed by the granted right of way.

Petitioners further state that there are only two statutes which are to be considered in deciding the case, they being the Homestead Act of May 20, 1862, *supra*, and the Northern Pacific Right of Way Act of July 2, 1864 (13 Stat. 365). Reference to the Act of March 8, 1922 (43 U.S.C.A. § 912, 42 U. S. Stat. 414) and the Right of Way Leasing Act (30 U.S.C.A. §§ 301-306, 46 Stat. 373) is completely omitted. The latter two Acts are referred to in a veiled way and written off by petitioners at the bottom of page 12 of their Petition as "later legislation", stating that subsequent to the date of issue of the patents granted to petitioners' predecessors, legislation was enacted providing for the reservation of minerals by the United States in lands granted by the United States for railroad rights of way purposes. The petitioners by failing to make reference to the Act of March 8, 1922 and the Right of Way Leasing Act appear to be purposefully attempting to mislead the Court since both of those Acts are vital in arriving at a decision in this case.

The petitioners make reference in both their Statement of the Case and in their Reasons for Granting the Writ to the fact that only the Homestead Act and North-

ern Pacific Right of Way Act are to be considered, saying in the last full paragraph on page 7 of the Petition that "the decision turns entirely on the construction and application of the Homestead Act and the Railroad Right of Way Act, *supra*." Again, in the last full paragraph on page 9, petitioners state "There is no statute that justifies the lower court ruling and none is claimed to exist by the respondents." Said statements by petitioners obviously are erroneous and misleading. Respondents have relied on both the March 8, 1922 Act, *supra*, and the Right of Way Leasing Act, *supra*.

Under the heading of "Questions Presented" on page 3 of the Petition, in order to support the making of the Petition, it is stated that the question presented by the case "has never been previously litigated in the Federal Courts." The statement is not entirely true since the question as to ownership of minerals in railroad right of way granted by the United States has been previously litigated, two of the leading cases being *United States* v. *Union Pacific Railroad Company*, 353 U.S. 112, 77 S. Ct. 685, and *Great Northern Railway Company* v. *United States*, 315 U.S. 262, 62 S. Ct. 529.

In the paragraph beginning at the bottom of page 7 of the Petition, in an attempt to support petitioners' contention that the words "in a body" as they appear in the Homestead Act, *supra*, necessarily mean that a homestead patentee acquired the minerals under a granted railroad right of way traversing the lands included in a patent, it is stated that "It is acknowledged by all that the oil and gas under this right-of-way was never conveyed to the railroad." Petitioners then go on to infer that if homestead patentees do not acquire all of the minerals in the lands patented under the Homestead Act, even though traversed by a railroad right of way, that the words "in a body" are

meaningless. What petitioners do not say is that under the Act of March 8, 1922, which specifically reserves to the United States all minerals in lands under a granted railroad right of way upon the abandonment or forfeiture thereof, and under the Right of Way Leasing Act, title to the minerals in lands under a granted railroad right of way is in the United States.

At the top of page 9 of the Petition, it is stated that the lower court has ignored the *United States* v. *Union Pacific Railroad Company* case, *supra*, and relies solely upon the decision of *Northern Pacific Railway* v. *Townsend*, 190 U.S. 267. That, too, is an incorrect statement in that the *Union Pacific* case has been specifically mentioned in all of the decisions rendered by both Courts and the Interior Board of Land Appeals, including the decision of the Court of Appeals for the Eighth Circuit.

Incidentally, at both pages 10 and 12 of the Petition, the language from the *Townsend* case, *supra*, is erroneously quoted in that the word "fee" is not emphasized in the statement quoted from the decision and the sentence quoted from the decision does not begin with the word "It". Actually the quotation is taken out of context since the Court then goes on to arrive at its conclusion that what was granted to the Northern Pacific Railroad Company by the Act of July, 1864 was "of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Petitioners again at page 11 of their Petition, under paragraphs numbered 5 and 6, seemingly attempt to mislead the Court by expressly stating that there are no statutes which would contemplate the retention by the United States of minerals in the lands underlying a granted railroad right of way.

This holding that the right of way conveyance took the land out of the category of public lands has never been modified by this Court or any other court, to our knowledge. And it has been recognized and followed by the U. S. Court of Appeals as follows:

> "Wyoming and Gulf rest their case on the proposition that the location of a railroad right-of-way across a tract of public land of the United States does not separate the servient estate from the public domain with the result that the title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract. The United States and Union Pacific concede that this rule applies to post-1871 grants but deny its application to previous grants."
>
> "The railroad has the right to explore for coal and iron and if any is discovered it belongs to the railroad. Such right is in a different category from a surface easement. The grant of the coal and iron with the incidental rights of exploration and development disposed of a part of the section traversed by the right-of-way. This prior disposition served to exclude the right-of-way from the grant of school sections made by the Enabling Act."
>
> "The effect of this conclusion is that title to the servient estate did not pass with the conveyance of the encumbered tract. Instead, it remained in the United States and the United States retains the rights, specifically here the ownership of the underlying oil and gas, not granted to the railroad." *State of Wyoming* v. *Udall*, 379 F. 2d 639, 640 (10th Circuit, 1967).

It should be noted that this Court denied certiorari in this case in 389 U.S. 985, 88 S. Ct. 470, which means an affirmance of the rule in the *Townsend* case.

In the case *Cornelius* v. *Kessel,* it is said "The United States had no power to grant lands which it has previously granted to an individual." *Cornelius* v. *Kessel,* 128 U.S. 456, 9 S. Ct. 122.

After a railroad right of way grant "has attached to specific lands, however, no title thereto or rights therein can be obtained by persons entering them under the general land laws." *Public Lands,* 73 C.J.S., page 810.

> "All the vacant and unappropriated public lands not reserved or excepted are subject to entry under the land laws."
>
> "All the vacant and unappropriated public lands not reserved or excepted are subject to entry under the land laws. Public lands are open to settlement only when they are free from any other claims of record, and the fact that the title to land may be in the United States does not necessarily make it part of the public domain which is subject to entry or settlement."
>
> "'Unappropriated public lands' is a term which implies that the lands are subject to entry under the homestead laws of the United States."
>
> "Offered lands, in the practice of the United States Land Department, are lands which are subject to private cash entry at the minimum price." 73 C.J.S. 686.

And see *U. S.* v. *Curtner,* 38 F. 1 (Circuit Court California 1889) where the court said:

> "After the grant (of right of way) has attached to specific lands, no title thereto or rights therein can be obtained by persons entering them under the general land laws, nor can the United States grant or convey the lands to another person."

Based upon the foregoing, it is submitted that plaintiff's petition should be denied.

Respectfully submitted,

CONMY, FESTE & BOSSART, LTD.

By E. T. CONMY, JR.

600 First National Bank Building
Fargo, North Dakota

FRANK S. FARRELL

176 East Fifth Street
St. Paul, Minnesota

Attorneys for Respondent Burlington Northern, Inc.